No. 88-2109

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE STATES OF KANSAS and MISSOURI,
AS *Parens Patriae*,
Petitioners,

v.

THE KANSAS POWER & LIGHT COMPANY and
UTILICORP UNITED, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL LEAGUE OF CITIES, AND U.S. CONFERENCE OF MAYORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amici will address the following question:

Whether, under Section 4C of the Clayton Act, enacted by Congress in the Hart-Scott-Rodino Antitrust Improvements Act of 1976, State Attorneys General may bring actions as *parens patriae* on behalf of indirect purchasers who have been injured as a result of a violation of the Sherman Act.

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INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal

issues that affect state and local governments. This case concerns the right of State Attorneys General under Section 4C of the Clayton Act—enacted into law by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 15c-h—in their capacity as *parens patriae*, to recover damages on behalf of their natural citizens who have been injured by violations of the Sherman Antitrust Act, 15 U.S.C. §§ 1-7.

Pursuant to Section 4C, Kansas and Missouri asserted claims on behalf of residential consumers of natural gas. The gas was purchased from public utilities that had, pursuant to law, passed on to the consumers the price increases occasioned by a price-fixing conspiracy on the part of the utilities' suppliers. The court of appeals held that the States' *parens patriae* claims must be dismissed because of the holding in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), that, with limited exceptions, indirect purchasers cannot recover damages under Section 4 of the Clayton Act, 15 U.S.C. § 15, for price-fixing violations.

Amici's concern is with the failure of the courts below to give effect to the authority conferred upon the State Attorneys General by Section 4C of the Clayton Act. In that provision, Congress authorized the State Attorneys General in their *parens patriae* capacity to recover damages inflicted upon their natural citizens by violations of the Sherman Act without regard to whether their citizens were indirect or direct purchasers. Section 4C creates a right of action separate and apart from Section 4 of the Clayton Act, the statutory provision interpreted in *Illinois Brick* and *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

Just last Term, in *California v. ARC America Corp.*, 109 S.Ct. 1661 (1989), the Court held there is a presumption against federal preemption of state antitrust law. The present case presents a corollary to that principle: when Congress expressly recognizes the right of a State

Attorney General to bring a *parens patriae* action, that right should be given full effect. In *ARC America*, the Court held that the bar on indirect purchaser suits announced in *Illinois Brick* did not preempt state laws permitting recovery of antitrust damages by indirect purchasers. *Amici* are concerned that the failure to uphold the authority that Congress expressly gave to the State Attorneys General in Section 4C of the Clayton Act will frustrate state antitrust efforts no less than preemption of the State's own laws.

Amici submit that the decision below is wrong. Because this Court's decision will have a direct effect on matters of prime importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

STATEMENT

Amici adopt the statement of the case of the petitioners.

SUMMARY OF ARGUMENT

The claims dismissed below were brought by State Attorneys General as *parens patriae* under Section 4C of the Clayton Act on behalf of consumers who are indirect purchasers ("indirect consumer purchasers") of natural gas that was the subject of a price-fixing conspiracy. The court of appeals dismissed on the authority of this Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which addressed the right of indirect purchasers to sue under Section 4. In its only reference to Section 4C, the court of appeals stated its assumption that Section 4C "comes into play when the individual consumers are the direct purchasers." Pet. App. A7 n.1. This assumption was error. The cause of action created by Section 4C is distinct from a cause of action under Section 4, and this Court has never determined the right of State Attor-

[1] The parties' letters of consent, pursuant to Rule 37 of the Rules of the Court, have been filed with the Clerk.

neys General under Section 4C of the Clayton Act to sue as *parens patriae* on behalf of indirect consumers for injury resulting from violations of the Sherman Act.

Section 4C of the Clayton Act was enacted in 1976 as part of the Hart-Scott-Rodino Antitrust Improvements Act of 1976. It authorizes suits on behalf of natural persons by State Attorneys General as *parens patriae*. The structure and language of Section 4C and the statute's legislative history make clear that Congress created a new cause of action to remedy perceived procedural and technical difficulties in providing compensation to consumers, including indirect consumer purchasers, for injuries suffered as a result of violations of the Sherman Act. Section 4C did not enlarge the scope of the violations defined by the Sherman Act, but rather provided a new remedy—separate and distinct from Section 4—to ensure the right of the ultimate consumer, whether a direct or indirect purchaser, to be compensated for damages resulting from such violations.

Congress's intent in enacting Section 4C—to provide a remedy to consumer purchasers, whether direct or indirect—would be extinguished if this Court's limitations in *Illinois Brick* on the right of indirect purchasers to bring suit under Section 4 of the Clayton Act is engrafted onto Section 4C. Section 4C's authorization of *parens patriae* actions to be brought by State Attorneys General reflects Congress's judgment of the balance to be struck in this type of action among the distinct policies of victim compensation, effective antitrust enforcement, and judicial economy. This Court, in *Illinois Brick* reached a different judgment when confronted with an indirect purchaser suit brought under Section 4 of the Clayton Act, which does not contain a *parens patriae* provision or other features of Section 4C pertinent to indirect purchasers. The Court should now give full effect to Congress's intent in enacting Section 4C by upholding the right of State Attorneys General pursuant to Section 4C of the Clayton Act

to bring *parens patriae* actions on behalf of indirect consumers for violations of the Shermar. Act.

ARGUMENT

SECTION 4C OF THE CLAYTON ACT AUTHORIZES STATE ATTORNEYS GENERAL TO BRING *PARENS PATRIAE* ACTIONS ON BEHALF OF INDIRECT PURCHASERS.

A. This Court Has Not Decided Whether A *Parens Patriae* Action On Behalf Of Indirect Consumer Purchasers May Be Brought Pursuant To Section 4C Of The Clayton Act.

This case presents the question whether a State Attorney General as *parens patriae* may seek damages for violations of the Sherman Act pursuant to Section 4C—not Section 4—of the Clayton Act on behalf of consumers who are indirect purchasers.[2] This question of statutory construction has not previously been reviewed by this Court, and we contend that none of this Court's prior antitrust decisions is dispositive, including notably *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). The decisions of the Seventh Circuit in *State of*

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[2] The question as we have framed it is properly before the Court because it is fairly comprised within the question presented and was decided by the court below. The complaints initiating the actions before the Court were filed by Kansas and Missouri as *parens patriae* and were specifically brought pursuant to Section 4C of the Clayton Act. See Missouri's Second Amended Complaint, ¶ 2; Kansas's First Amended Complaint, opening paragraph. Moreover, the question presented by petitioners regarding the right of State Attorneys General to sue *parens patriae* necessarily references Section 4C of the Clayton Act because that is the only section expressly permitting such suits. Indeed, the petition for writ of certiorari argues (at page 14) that the decision below frustrates the purpose of Section 4C. Finally, the Tenth Circuit "assumed" that States did not have a right to sue under Section 4C as *parens patriae* on behalf of indirect purchasers. Pet. App. A7 n.1.

Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line Corp., 852 F.2d 891 (7th Cir.) (en banc), cert. denied, 109 S.Ct. 543 (1988), and the Tenth Circuit below are in error to the extent that both treat the authority of a State Attorney General to bring a *parens patriae* suit on behalf of indirect consumer purchasers as turning on whether such a suit falls within an exception to the general ban on indirect purchaser suits under Section 4 of the Clayton Act set forth in *Illinois Brick*.[3]

Neither *Illinois Brick* nor its predecessor, *Hanover Shoe*, purported to construe Section 4C. *Hanover Shoe* was decided eight years before Section 4C was enacted. And *Illinois Brick*, decided the year after Section 4C became law, did not involve the right of a State Attorney General to sue as *parens patriae* under Section 4C.[4] Indeed, it could not have done so because the State of Illinois, the plaintiff in that case, did not sue as *parens patriae* on behalf of injured consumers. It sued, rather, on behalf of itself and other governmental entities who were themselves indirect purchasers of concrete blocks used in state building projects.[5]

The Hart-Scott-Rodino Antitrust Improvements Act was enacted eighty-six years after the Sherman Act, and

[3] As indicated, the court below assumed that Section 4C "comes into play when the individual consumers are the direct purchasers." Pet. App. A7 n.1. The district court opinion in *State of New York v. Dairylea Co-op. Inc.*, 570 F. Supp. 1213, 1215-16 (S.D.N.Y. 1983), also treats Section 4C as applying only to consumers who are direct purchasers.

[4] The Court's opinion in *Illinois Brick* does include a discussion of the legislative history of the Act, but solely in the context of determining the implications of that history for a proper construction of Section 4. 431 U.S. at 733 n.14, 747 n.31.

[5] Even if the State had wanted to sue as *parens patriae*, it could not have done so because Section 4C of the Act did not apply to suits filed prior to enactment. See Pub. L. No. 94-435, § 304, 90 Stat. 1396. Moreover, the claimants in that suit were not natural persons as is required by Section 4C.

sixty-two years after the Clayton Act, which contains Section 4. It was enacted over vigorous opposition and after extensive debate in both Houses. A plain reading of the Act, as well as its legislative history, make clear that Section 4C has a structure and purpose distinct from Section 4 and must be interpreted in light of its own language, structure, purpose, and legislative history—not that of Section 4.

B. The Language Of The Hart-Scott-Rodino Act Specifically Created A New Remedy, *Parens Patriae* Suits, On Behalf Of Consumers, Whether Direct Or Indirect Purchasers.

As is true in every case involving statutory construction, the analysis must begin with the language employed by Congress, *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 5 (1985); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979). Section 4C of the Clayton Act, 15 U.S.C. § 15c, provides in pertinent part:

> Any attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of the Sherman Act.

In enacting Section 4C, Congress intended to create a new cause of action for the specific purpose of allowing consumers, including indirect purchasers, to be compensated for violations of the Sherman Act.[6] Congress also

[6] See discussion in Part C *infra*. That Section 4C actions are separate from Section 4 actions is confirmed by the language of Section 4B, 15 U.S.C. § 15b, as amended by the Hart-Scott-Rodino Act, which provides that "[a]ny action to enforce any cause of action under sections 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued." Section 4 appears as Section 15 in the U.S. Code, and Section 4C appears as Section 15c.

provided distinctive features for this new cause of action to alleviate problems that had impeded such relief in the past in actions brought under Section 4. The *parens patriae* form, for example, aggregates consumer claims, thereby providing an incentive for enforcement of the antitrust laws. This incentive is enhanced by placing control of such actions solely in the hands of a responsible law enforcement official.

Section 4C further provides that in awarding monetary relief the court "shall exclude . . . any amount of monetary relief which (A) duplicates amounts which have been awarded for the same injury, or (B) which is properly allocable to . . . (ii) any business entity." This language and structure leave no doubt that Congress intended to authorize suits on behalf of indirect purchasers. Only if both direct and indirect purchasers may bring suit for the same price-fixing violation will the possibility arise of a duplicative damage award for the same injury or of damages properly allocable to a business entity.

It is a fundamental article of statutory construction that a statute should be interpreted to give effect to each of its words. *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Reiter v. Sonotone Corp.*, 442 U.S. at 339. The exclusionary language of Section 4C can have no effect except in the context of a suit brought on behalf of indirect purchasers. Thus, the statute should be construed to include both direct and indirect purchasers within the class of natural persons on whose behalf a *parens patriae* action may be brought.

Indeed, if Section 4C were construed to apply only to direct consumer purchasers, then many, perhaps most, antitrust violators would be beyond its reach.[7] This is so

[7] This is not true for Section 4 of the Clayton Act, which allows any "person" (which has been construed to include a corporation or other business entity) to bring suit. Thus, even though *Illinois Brick* bars indirect purchasers from bringing suit under Section 4, the effect is not to insulate antitrust violations from suit under Section 4. Some entity—be it a natural person or a business entity—will have purchased directly from the antitrust violator and will have standing to sue.

because, under Section 4C, a *parens patriae* suit may only be brought on behalf of natural persons; and in most distribution chains in which a Sherman Act violation occurs, there will be no "natural person" purchasing directly from the violator.

Thus, if Section 4C is construed to exclude indirect consumer purchasers, then whenever a Sherman Act violation occurred more than one level in the distribution chain above the consumer, the Attorney General could not bring a Section 4C action. Nothing in the language of Section 4C indicates a congressional intent to immunize antitrust violators who do not trade directly with consumers from such actions.[8] Such a construction would frustrate the manifest intent of Congress to enable State Attorneys General to vindicate consumers' interests in goods flowing through a market unimpeded by price-fixing (and other Sherman Act violations), wherever in the chain of distribution these violations might occur. For the Act to achieve its purpose, it must be construed to reach indirect consumer purchasers.

[8] Section 4C does contain language similar to Section 4 regarding the injury requirement. Thus, Section 4C refers to "injury sustained by such natural persons to their property by reason of any violations of the Sherman Act," and Section 4 refers to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." This similarity cannot mean, however, that the interpretation given by this Court in *Illinois Brick* to "injury" in Section 4 should be grafted onto Section 4C. The meaning given to "injury" in Section 4C by Congress must be determined by construing that term as it is used in Section 4C itself. See *Dole v. United Steelworkers of America*, No. 88-1434 (Feb. 21, 1990), slip op. 8 (in construing a statute, court must look to the entire law and its object and policy).

C. The Legislative History Of The Hart-Scott-Rodino Act Confirms Congress's Intent To Authorize *Parens Patriae* Suits On Behalf Of Indirect Purchasers.

The legislative history of the Hart-Scott-Rodino Act confirms Congress's intent to authorize *parens patriae* suits on behalf of individual consumers, whether they are direct or indirect purchasers, who suffer injury as a result of violations of the Sherman Act. The legislative reports and the floor debate demonstrate beyond question that Congress considered the problems that may be associated with indirect purchaser suits, and designed Section 4C to address these problems, to compensate injured consumers, and to deter antitrust violations.

1. *The House and Senate Reports both show an intent to authorize* parens patriae *suits on behalf of indirect purchasers.*

Both the House and Senate Reports evidence Congress's intention that the *parens patriae* suits that were specifically authorized in behalf of individual consumers include indirect, as well as direct, purchasers. The House Report sets out the purpose of the *parens patriae* provision in broad and general terms—to "permit State attorneys general to recover monetary damages on behalf of State residents injured by violations of the antitrust laws." H.R. Rep. No. 499, 94th Cong., 1st Sess. 3, reprinted in 1976 U.S. Code Cong. & Ad. News at 2572. There is no suggestion that Congress intended to limit this remedy to direct purchasers. The Report goes on to discuss the problem of price-fixing in particular, which it states creates an economic burden that "is borne in large measure by the consumer in the form of higher prices for his goods and services. . . . [P]ractices [such as price-fixing] usually result in higher prices for the consumer, regardless of the level in the chain of distribution at which the violation occurs." *Ibid.*, reprinted in 1976 U.S. Code Cong. & Ad. News at 2573. Clearly, this was a bill intended to address consumer interests.

The House Report specifically addresses whether a consumer who is an indirect purchaser has a remedy under Section 4C: "Under section 4 of the Clayton Act, any person, including *any* consumer, who can prove he was injured by price-fixing or any other antitrust violation, has a cause of action." House Report at 6, reprinted in 1976 U.S. Code Cong. & Ad. News. at 2575 (emphasis added). A footnote to that sentence notes that some courts had initially read *Hanover Shoe* to limit standing to sue to the direct purchaser only, but "[m]ore recently lower courts have recognized the pro-enforcement thrust of *Hanover Shoe* and have held that plaintiffs at lower levels of the chain of distribution may attempt to prove that illegal overcharges were in fact passed on to them." House Report at 6 n.4, reprinted in U.S. Code Cong. & Ad. News at 2576. The Report cites in particular *In Re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), cert. denied *sub nom. Standard Oil Co. of California v. Alaska*, 415 U.S. 919 (1974), a case that would have allowed indirect purchasers to recover.[9] *Ibid.*

Thus, it is apparent that when Congress enacted Section 4C, it believed that indirect consumer purchasers had a cause of action under Section 4, but was concerned that the small damage suffered by any individual consumer would chill the incentive to bring suit under Section 4. House Report at 6, reprinted in U.S. Code Cong. & Ad. News at 2575; cf. *Illinois Brick*, 431 U.S. at 747 n.31. The *parens patriae* provision was Congress's carefully crafted legislative response to this concern. It was intended to overcome this problem for all consumers,

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[9] The House Report reference to Section 4 of the Clayton Act reflects the fact the bill on which the report was issued, H.R. 8532, created a cause of action under Section 4 of the Clayton Act. The bill in pertinent part provided that "[a]ny State attorney general may bring a civil action . . . under section 4 of this Act." The statute ultimately enacted, however, is not premised on Section 4 of the Clayton Act, but provides a separate cause of action. See note 14, *infra*.

whether direct or indirect purchasers. The House Report explicitly states that "[w]here, however, *wholesalers and retailers have passed on all or most of the cost of a violation to the consumer*, or where the violation itself occurred at the retail level (thus subjecting the consumer to the major impact of the violation), adequate enforcement mechanisms simply do not exist." House Report at 7-8, reprinted in 1976 U.S. Code Cong. & Ad. News at 2577 (emphasis supplied).

The Senate Report, too, demonstrates the clear intent to provide a remedy for consumers who are indirect purchasers. The purpose of the *parens patriae* provision is "to permit State attorneys general to recover damages for violations of the Sherman Act to secure redress for damage done to natural persons (consumers) residing in their State." S. Rep. No. 803, 94th Cong., 2d Sess. 39 (1976) (footnote call omitted). The Report also states that Section 4C "creates a new statutory cause of action for States." *Id.* at 42.[10] It further explains that "Section 4C is intended to assure that consumers are not precluded from the opportunity of proving the amount of their damage and to avoid problems with respect to manageability, standing, privity, target area, remoteness, and the like." *Ibid.*[11] Later in the Report, the intent to include indirect purchasers is again indicated: the statutory language was intended "to avoid the previously referred to problems associated with such concepts as remoteness, target area, privity of contract, *passing on, etc.*" *Id.* at 45 (emphasis added).

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[10] The Senate bill, which in this respect was enacted into law, does not premise the cause of action on Section 4 of the Clayton Act, as did the House bill. See note 14, *infra*.

[11] This statement is particularly germane to the issue before this Court because, before *Illinois Brick*, the *Hanover Shoe* doctrine was often conceived to be one of standing. See *Illinois Brick*, 431 U.S. at 732 n.14.

It was so clearly the intent of the drafters of Section 4C to permit suit on behalf of indirect consumer purchasers that they drafted other components of the bill to ensure that this result would not create inconsistencies. Thus, the Senate Judiciary Committee rejected efforts to delete the treble damage component from *parens patriae* actions under Section 4C on the ground that this would lead to inequitable results: if *parens patriae* actions were limited to only single damages, and if, for example, direct purchasers passed on one-half of an illegal overcharge to a consumer and absorbed the other half, then the direct purchasers "could collect treble damages for the one-half they absorbed but the consumer could collect only single damages for the passed on one-half." Senate Report at 45.

The Senate Judiciary Committee was also concerned with the problem of double recovery, which could only occur if both direct and indirect purchasers were allowed to sue. Accordingly, the Senate Report explains (at page 44-45) (emphasis added) that Section 4C

> contains a proviso to assure that defendants are not subject to duplicative liability, particularly in a chain-of-distribution situation where it is claimed that middlemen absorbed all or part of the illegal overcharge. . . . *As between competing claimants within the chain of distribution, however, including consumers*, the Section 4C(a)(1) proviso is intended to assure that the monetary relief is properly allocated.

Finally, the Report states it was the Committee's intention to codify *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973), cert. denied *sub nom. Standard Oil Co. of California v. Alaska*, 415 U.S. 919 (1974), a case which would have allowed the offensive use of a pass-on theory. See *Illinois Brick*, 431 U.S. at 730 n.11. The Senate Report reprints a discussion from *In re Western Liquid Asphalt* concerning various procedural devices to avoid double recovery. Senate Report at 44.

The Senate and House Reports were available to both Houses before they finally approved the Hart-Scott-Rodino Act. Accordingly, these two Reports are entitled to significant weight as evidence of congressional intent. See *National Ass'n of Greeting Card Publishers v. United States Postal Service*, 462 U.S. 810, 832 n.28 (1983). Both Reports demonstrate beyond doubt that a basic intention of the drafters was to ensure that suits on behalf of indirect consumer purchasers could be brought under Section 4C.

2. ***The record of the floor debates in both the Senate and the House indicates that Congress understood Section 4C to authorize* parens patriae *suits on behalf of indirect purchasers.***

On March 18, 1976, the House of Representatives debated and passed H.R. 8532, entitled the "Antitrust Parens Patriae Act." This was the House version of the bill that, after amendment by the Senate, was finally enacted into law as the Hart-Scott-Rodino Act. The record of the debate fully supports the view that Congress intended to create a cause of action that would provide a remedy for indirect purchasers.

The right of indirect purchasers to recover under the bill was not disputed, even by the opponents of the bill. They were concerned, however, that indirect purchasers be allowed to recover only for that portion of the illegal overcharge actually passed on to them by the direct purchaser. Thus, Congressman Wiggins, a member of the Judiciary Committee that drafted the bill (which he opposed), stated: "This whole problem of pass-through is a technical one; but I am of the opinion that the bill does not relieve the plaintiff of the duty of proving that damages have been passed through to individual claimants." 122 Cong. Rec. 7031 (1976). Congressman Wiggins also questioned the impact a *parens patriae* action would have on other innocent purchasers who were further up the chain of distribution. He asked: "[I]f an attorney general brings a parens patriae case on behalf of 'consumers,' must every other natural person in the chain of distribution 'opt out' in order to protect his own rights to bring an independent treble damage action?" *Ibid.* If only the direct purchaser were covered by the Act, this question would be without meaning.

Congressman Symms, also an opponent of the bill, cited *Hanover Shoe* as support for his argument that "[a]rriving at an estimate of damages which were actually suffered by the consumer will be impossible." 122 Cong. Rec. 7035 (1976). This reference to the difficulty of tracing an illegal overcharge through the chain of distribution is simply another manifestation of a shared understanding among both the proponents and opponents of the bill that indirect consumer purchasers were beneficiaries of the bill.

On September 16, 1976, the House, after debate, passed the Hart-Scott-Rodino Antitrust Improvements Act of 1976, which was the Senate-passed version of the earlier House bill. Congressman Rodino, in his extensive remarks regarding the bill, explicitly discussed the indirect purchaser issue. Congressman Rodino stated that "assuming the State attorney general proves a violation, and proves that an overcharge was 'passed on' to the consumers, injuring them 'in their property'; that is, their pocketbooks —recoveries are authorized by the compromise bill whether or not the consumers purchased directly from the price fixer, or indirectly, from intermediaries, retailers, or their middlemen." 122 Cong. Rec. 30878 (1976). In even stronger terms, Congressman Rodino remarked that "the manufacturer invariably sells through wholesalers and retailers—grocery stores, drug stores, and the like—and if the intervening presence of such a middleman is to prevent recovery, the bill will be utterly meaningless." *Ibid.* This language is absolutely clear, and it is consistent with the statute itself and the remainder of the legislative history. Moreover, it expresses the views of a chief

sponsor of the bill. As such, it is excellent evidence of congressional intent. *North Haven Board of Education v. Bell*, 456 U.S. 512, 526-27 (1982), and cases cited.

The debates in the Senate are to the same effect. Senator Hart, one of the principal drafters of the Senate bill (S.1284) introduced the bill to the Senate on May 25, 1976, with extensive remarks.[12] There he summarized the elements that a State Attorney General has the burden of proving:

> First, the defendants violated the Sherman Act;
>
> Second, that consumers were injured by the violation *or that some of the overcharge was passed on to them*; and
>
> Third, the approximate amount of such damage.

122 Cong. Rec. 15311 (emphasis added). Again, as a sponsor of the bill, Senator Hart's remarks are particularly probative. To Senator Hart it was clear that injury to indirect purchasers could be remedied under the bill.

Indeed, Senator Bellmon, an opponent of the bill, used this very feature as a means to attack the bill's necessity. "[M]ost of the defendants who are sued in consumer actions," he argued, "are businesses that deal with other business enterprises before their products ever reach consumers." 122 Cong. Rec. 15323 (1976). From this, Senator Bellmon concluded that whenever an antitrust violation occurs, a direct purchaser will be present and ready to bring a "well-financed and competent" suit, and that therefore the "specter of a violator retaining huge illegal profits" absent the *parens patriae* procedure is

[12] Senator Hart stated that Title IV, the *parens patriae* section of the bill, "would create a new statutory cause of action whereby the State attorney general could sue for treble damages and other relief on behalf of consumers." 122 Cong. Rec. 15311 (1976).

mythical." [13] *Ibid.* Senator Bellmon's unsuccessful opposition demonstrates how thoroughly recognition that the bill would create a cause of action on behalf of indirect purchasers permeated the debate.[14]

D. This Court's Treatment Of The Legislative History Of The Hart-Scott-Rodino Act In *Illinois Brick* Is Not Inconsistent With The Foregoing Argument And Has No Bearing On Whether An Action On Behalf Of An Indirect Purchaser May Be Brought Under Section 4C.

The Court's discussion in *Illinois Brick* of the legislative history of Section 4C is limited to two footnotes. 431 U.S. at 733 n.14, 747 n.31. In no way is that discussion inconsistent with our contention that Section 4C provides a cause of action for indirect purchasers. Addressing itself to an argument made in the dissent, the Court discussed only whether, under *Hanover Shoe*, the pass-on rule under Section 4 of the Clayton Act should be limited to defensive use. As such, the Court's discussion has no relevance to the issue presently before this Court.

In his dissent in *Illinois Brick*, Justice Brennan concluded that "Congress' interpretation of § 4 in enacting the *parens patriae* provision should resolve [the ques-

[13] Senator Bellmon referred to the *Hanover Shoe* decision to bolster his argument that the direct purchaser would be an effective plaintiff, even where it had "passed on" the price increase to consumers. 122 Cong. Rec. 15325, 15326 (1976).

[14] For further example, Senator Bellmon referred to the "impracticability of trying a lawsuit to determine whether the financial effects of an antitrust violation have been passed on to an individual consumer." 122 Cong. Rec. 15326 (1976). Senator Bellmon inserted into the record an excerpt from a letter by Professor (now Judge) Posner opposing the bill that also discussed the difficulty of tracing the economic ramifications of an antitrust violation throughout a state's economy. *Ibid.* It is clear that Congress, in enacting this legislation, deemed none of these problems sufficient to bar the creation of a cause of action for indirect purchasers.

tion whether indirect purchasers could recover for damages passed on to them] in favor of their authority to sue." 431 U.S. at 758. The Court disagreed, on the grounds that these interpretive statements were made after the enactment of the Clayton Act and as such could not be used to show the intent of a prior Congress. 431 U.S. at 733 n.14. Nevertheless, the Court plainly agreed with Justice Brennan that the legislative history evidenced Congress's view at the time it enacted Section 4C that indirect purchasers could bring suit under Section 4. *Ibid.* As noted, *Illinois Brick* was not a *parens patriae* action under Section 4C. The Court's decision not to rely on Congress's interpretation in 1976 of Section 4, which was enacted in 1914, is neither remarkable (see *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117-18 (1980), and cases cited) nor relevant to whether Section 4C creates a cause of action designed to remedy injury suffered by indirect purchasers.

Congress's intent in enacting Section 4C in 1976 is to be determined by the language of the statute, and, to the extent there is any question of interpretation, the legislative history of that statute. When it enacted a new cause of action to remedy consumer injury, Congress held an interpretation of Section 4 that this Court subsequently rejected in *Illinois Brick*. But this Court's construction of Section 4 in *Illinois Brick*, after the enactment of Section 4C, cannot have any bearing on what Congress intended in enacting Section 4C.[14] As demon-

[14] This Court's statement in *Illinois Brick* that Congress intended Section 4C to be solely a procedural device to permit consumers injured within the meaning of Section 4 to bring suit (see 431 U.S. at 733 n.14) is not supported by the statute or its legislative history. The Court relied upon the House Report as support for the statement that Section 4C(a) "tracks" Section 4. The House Report quoted, however, concerned House Bill 8532, which was substantially revised before enactment. Of critical importance is that

strated above, Congress intended to create a new cause of action that would provide a remedy to consumers—whether direct or indirect purchasers—injured by violations of the Sherman Act. That intent should be given full effect by the Court.

E. Section 4C Reflects Congress's Judgment On The Proper Balance Among Enforcement, Compensation, And Judicial Efficiency.

In enacting Section 4C, Congress was well aware of the family of concerns that would be expressed a year later by this Court in *Illinois Brick* regarding the inad-

Section 4C(a) of the House bill did track Section 4 of the Clayton Act. It provided: "[a]ny State attorney general may bring a civil action . . . under Section 4 of this Act." Section 4C as enacted does not refer to or rely upon Section 4. A summary of the differences between the Senate and House passed bills and the bill ultimately passed by both Houses (the Byrd motion) appears at 122 Cong. Rec. 29151 (1976). With respect to this point, the summary states as follows:

DIFFERENCES BETWEEN SENATE AND HOUSE PASSED BILLS AND BYRD MOTION

III. PARENS PATRIAE

A. Major Issues

Subject	Senate	House	Provision in Byrd motion
1. Separate cause of action.	Senate bill creates a separate cause of action in the name of the State.	House bill authorizes parens patriae action under section 4 of Clayton Act by State attorneys general.	Senate

Thus, it is clear that the bill enacted created a separate and independent cause of action. The views of those in the House who sought an arguably more restricted statute cannot control the interpretation of the bill actually passed. See *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 11 (1968).

visability of permitting antitrust actions under Section 4 by indirect purchasers. See, *e.g.*, Appendix 9 to Senate Report Part II—Minority Views (March 3, 1976, letter of Professor Posner).

In *Hanover Shoe*, this Court indicated its concern with the problems of providing an adequate incentive for injured parties to sue for antitrust violations, with the possibility of duplicative recoveries, and with the difficulty of ascertaining the amount of any pass-on of unlawful overcharges. As the statutory language and legislative history make clear, Congress in Section 4C created a new cause of action to deal with these concerns.

Section 4C provides an adequate incentive to sue where a large number of consumers have each suffered a small injury by creating a remedy that aggregates consumers' claims. House Report at 6, reprinted in U.S. Code & Ad. News at 2575. To ensure that these claims would be handled responsibly and to enhance the incentive to sue, *parens patriae* actions may be brought only by the Attorney General of a State.

Section 4C provides a specific mechanism to avoid duplicative damages that may result when both direct and indirect purchasers sue. A court in awarding damages under Section 4C must exclude any damages awarded to other parties for the same injury.

Finally, Section 4C requires the trial court to apportion damages. Recognizing that this requirement presented a difficult task for both the plaintiff and the courts, Congress nonetheless specifically provided that a court in making an award of damages under Section 4C must exclude damages that should be apportioned to any business entity.

That Congress made a different judgment in Section 4C as to how the balance should be struck among the distinct policies of encouraging enforcement, compensating the victims of antitrust violations, and judicial efficiency from this Court's subsequent judgment as to Section 4 in *Illi-*

nois Brick does not make the Court or Congress right or wrong. Congress discharged its legislative function in creating a new remedy under Section 4C. See *Reiter v. Sonotone Corp.*, 442 U.S. at 344. The Court exercised its judicial function in interpreting Section 4. As the Court noted, Congress was free to change the balance with respect to indirect purchaser suits barred by *Illinois Brick*. 431 U.S. at 746. In fact, for claims brought by State Attorneys General as *parens patriae* on behalf of indirect consumer purchasers, Congress had already done just that in Section 4C.

CONCLUSION

For these reasons, the judgment below should be reversed.

Respectfully submitted,

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